IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 543 OF 2006

Zhahid Hussain Mirza .. Appellant

versus

The Municipal Corporation of .. Respondent

Gr. Bombay.

...

Mr. N.P. Pandit with Mr. G.V. Aiman for appellant.

Mrs. Geeta Joglekar for Respondent.

CORAM : D.G. Karnik, J.

DATED : 18th August 2006.

P.C.:

1. Heard learned counsel for the parties. By consent the appeal is heard finally.

2. On 30th July, 2006 the respondent Municipal Corporation issued notice under order 314 of Bombay (Mumbai) Municipal Corporation Act, 1988, to the appellant for removal of the structure errected on the street, namely S.G. Barve Marg, Nehru Nagar, Kurla

(E), Mumbai 24. The notice directed that the appellant to remove the structure within 24 hours of the service of the notice. The notice did not contemplate giving any hearing to the applicant. Immediately on receipt of the notice the appellant filed a suit bearing suit no. 3277 of 2006, in the City Civil Court, Mumbai and took out a notice on motion, being motion no. 2836 of 2006, for interim injunction restraining the respondent from demolishing the structure pending for hearing the dicision of the suit. By the order dated 21st July, 2006, the learned City Civil Judge rejected the appellant's motion. That decision is impugned in this appeal.

3. In Olga Tellis V/s. ombay Municipal Corporation and others, reported in 1985 (2) Bom.C.R.434 : (3) S.C.C. : AIR 1986, S.C. 180, the Supreme Court was considering whether section 314 of the Bombay Municipal Corporation Act was ulta virus the Constitution of India as it permits the Commissioner to take action of removal of an encroachment of any street without notice to the occupants. In the context of the said challenge the Supreme Court interpreted section 314 of the Mumbai Municipal Corporation Act and observed in paras 44 and 45 of its decision as follows:

"Considered in its proper perspective. Section 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner, in appropriate case, to dispense with previous notice to person who are likely to be affected by the proposed action. It does not require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must cause the removal of an encorachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What Section 314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It does not commond that the Commissioner shall without notice, cause an encroachment to be removed. Putting it differently, Section 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. He must lean in favour of this interpretation because it help sustain the validity of the law. Reading Section 314 as containing a command not to issue notice before the removal of an encroachment will make the law invalid.

45. It must further be resumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay in all other cases, no departure from the audi alteram partem rule (’Hear the other side’) could be presumed to have been

> intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situtation which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearding may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existance.(emphasis supplied)"

4. It is thus clear that Supreme Court has laid down that the Commissioner shall give notice and hearing to the persons concerned before removal of the structure exept in rare cases where action is required to be taken in circumstances of urgency which brooks no delay. In the present case notice has been issued under section 314 of the Mumbai Municipal Corporation Act, 1888. However, in the notice does not contemplate any hearing, it only directs the appellant to remove the structure within 24 hours failing which the structure would be removed by the Commissioner. It is clear that the decision of the Supreme Court in

the case of Olga Tellis V/s. Bombay Municipal Corporation, (Supra) is not followed. No circumstances have been pointed out requiring the commissioner to take immediate action without hearing.

5. In view of the above position learned counsel for the respondent fairly stated that the respondent would not take action of demolition of the structure of appellate without granting him hearing. He further stated that in persuance of the notice dated 13th July, 2006 the appellant may remain present in the office of Assistant Commissioner of Municipal Corporation, ward 1, on 25th September, 2006 at 12.00 noon. If on that date the matter cannot be heard on any reason, the Assistant Commissioner would adjourn the hearing to any other suitable date. After hearing the Assistant Commissioner shall pass the necessary orders and shall not taken any action for 72 hours. In view of this statement no further orders and necessary appeal is accordingly disposed of.

(D.G. KARNIK, J)